BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK R. HANSON Claimant VS. **THOMPSON CONCRETE COMPANY** Respondent AND **EMPLOYERS MUTUAL CAS. CO.** Insurance Carrier	)	Docket No. 1,035,554

ORDER

STATEMENT OF THE CASE

Claimant requested review of the December 19, 2007, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that the preponderance of the evidence indicated that claimant was not injured in the manner he alleged. Further, the ALJ found that if claimant was assaulted for no reason, as alleged, it would not be compensable as a work related accident. Accordingly, the ALJ denied claimant's request for medical and temporary total disability benefits.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 18, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends that he was struck in the forehead by his supervisor, that the blow was without provocation and should be viewed as work place horseplay, and that claimant was an innocent victim, making his injuries compensable. Claimant further asserts that the uncontroverted evidence shows that he met with personal injury by

accident arising out of and in the course of his employment. Accordingly, he contends he is entitled to workers compensation benefits.

Respondent argues that the preponderance of the evidence in this case supports the decision of the ALJ that claimant did not suffer personal injury by way of an assault by a coworker as alleged. Respondent further argues that under Kansas law, assaults by coworkers are only compensable if the assault arose from a dispute related to work or if the work place conditions combined with the assault to produce injury. Respondent asserts that claimant failed to meet his burden of proof that he was the victim of a coworker's assault on June 15, 2007, and the decision of the ALJ should be affirmed.

The issue for the Board's review is: Was claimant injured as a result of an accident that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant worked for respondent as a laborer. On June 15, 2007, between 6:30 and 7 a.m., he was sitting in a work truck with two coworkers waiting to travel to the work site. Wesley Sloan was driving the truck, and Bo Johnson was sitting in the middle of the seat. Claimant was sitting in the passenger seat next to the window, which was rolled down. Claimant stated that they were waiting for a coworker and were yelling at the coworker to hurry. At that time, according to claimant, Ben Thompson, the son of respondent's owner, came up to the truck and out of the blue hit claimant in the center of his forehead. Claimant stated that everything went black, and then he felt an immense amount of pain through the front, sides and back of his head. Claimant testified that his supervisor, Matt King, was made aware of the incident when he was called by Mr. Sloan, who told him that claimant had just been hit in the head by Mr. Thompson. Claimant testified that Mr. Sloan made this phone call soon after the incident when he and Mr. Sloan were still in the truck.

When claimant arrived at the job site, he talked to Mr. King in person and described how the incident occurred. Claimant also reported the incident to respondent's owner as soon as he got to the job site.

Claimant tried to work after he got to the job site, but he was lightheaded and had blurry vision. His head was pounding, and he felt sick to his stomach. He told his supervisor about his problems and asked to see a doctor. Respondent's owner then told Mr. Sloan to go with the claimant. Mr. Sloan took claimant home, and claimant went to the hospital himself. The emergency room records indicate that claimant got to the hospital at 10:29 a.m.

At the emergency room, claimant complained of headache, double vision and nausea. The emergency room records show that claimant had a 5 x 6 cm. contusion on his forehead. A CT scan was taken of claimant's head which showed that he had a "very

small hematoma in the scalp on the forehead" but no intra cranial abnormality.[1] Claimant was diagnosed with a hematoma of the forehead, given some medicine, and told to follow up with his personal physician, Dr. Ernest Ojeleye. Claimant was seen by Dr. Ojeleye two times, but when he tried to return he was told Dr. Ojeleye would not see him because his workers compensation claim had been denied.

Claimant states he has a headache constantly, as well as sharp pain down the back of his neck. He also claims he has memory issues and anger issues. He has returned to work part time picking up trash at construction sites. He claims he cannot work around heavy equipment.

Ben Thompson testified that on June 15, 2007, he approached the truck in which claimant was sitting because he was looking for another coworker. He was yelling for the coworker, and claimant leaned out of the window of the truck and mocked everything that he was saying. Mr. Thompson told claimant to shut his mouth and said he did not appreciate the way he was talking in front of his coworkers. Mr. Thompson did not think claimant was taking him seriously, so he walked to the truck and grabbed the hat off claimant's head. Mr. Thompson testified that claimant told him that he could do whatever he wanted and did not have to listen to anyone. Mr. Thompson said he kept hold of claimant's hat while telling him not to act like that in front of his coworkers. Mr. Thompson said that both Mr. Sloan and Mr. Johnson were sitting in the truck watching what was going on. The entire incident lasted about 30 seconds, after which Mr. Thompson returned claimant's hat. Mr. Thompson denied hitting claimant and said he only removed claimant's hat from his head. Mr. Thompson was later told by his father that claimant was claiming that he hit him.

Bo Johnson testified that he was in the truck with Mr. Sloan and claimant the morning of June 15, 2007. He was sitting between Mr. Sloan and claimant. Mr. Johnson testified that claimant leaned out the window of the truck and was heckling Mr. Thompson. Mr. Thompson then walked up to the truck and took off claimant's hat. Mr. Thompson and claimant exchanged words, and then Mr. Thompson returned claimant's hat to him. At no time did Mr. Thompson hit or punch claimant. Mr. Johnson could not remember the exact words Mr. Thompson or claimant said. He did not notice any bumps, bruises, or abrasions on claimant's head after the incident. He did not hear claimant tell Mr. Sloan that he had been hit in the head, nor did he hear Mr. Sloan call Mr. King and say that claimant had been hit in the head.

Wesley Sloan testified that he was sitting in the driver's seat in the truck with claimant and Mr. Johnson when Mr. Thompson and claimant had words. He said that Mr. Thompson came over and took claimant's hat off and had a few words with him and then gave claimant his hat back. He could not hear what they were saying because he was

[1] P.H. Trans., Cl. Ex. 1 at 5.

listening to the radio. He was not looking at them. At no time during that situation did he see Mr. Thompson strike claimant. He did not call Mr. King that morning on the way to the job site and did not tell Mr. King that claimant had been hit in the head.

Mr. Sloan said that after claimant had been at the job site a couple of hours, he said that his head hurt and he was dizzy and nauseated. Mr. Sloan was asked by respondent's owner to take claimant home.

Charles Wilson, a coworker at respondent, testified that he was not a witness to the altercation between claimant and Mr. Thompson on June 15. He and Mr. King had left the shop area earlier than everyone else. However, later that morning he observed that claimant was apparently head-butting a metal storage container at the job site. He was not able to see claimant's head actually hit the container because of the angle, but he could see claimant's head moving as if he was slamming it into the container. He estimated that he was about 50 yards away from claimant at the time of this observation.

Mr. Wilson left the job site early on June 15 and went to Colorado for several days. When he returned, he told respondent's owner what he had seen on June 15. Mr. Wilson also testified that when he returned, claimant and he got into an altercation when claimant began to yell at him when he was speaking with a city supervisor.

Vance Elder, a coworker at respondent, witnessed the incident between claimant and Mr. Thompson on June 15, 2007. He was sitting in a truck behind the truck in which claimant was sitting. He saw claimant and Mr. Thompson having words. He saw Mr. Thompson's hand inside the truck and claimant's hat come out of the truck. Mr. Thompson then reached down and picked up the hat and tossed it back to claimant. Mr. Elder did not see any type of punching motion by Mr. Thompson. He admitted he did not have a good view of the inside of the truck ahead of him. He could not hear anything that was being said.

At the preliminary hearing, claimant's attorney stated: "It was an unprovoked attack by an individual. . . . It's not horseplay. It's unprovoked. So that's why it's work related."[2]

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

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[2] P.H. Trans. at 88.

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[3]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

Fights between coworkers usually do not arise out of employment and generally will not be compensable.[7] If an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.[8] For

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[3] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[4] K.S.A. 2007 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[6] *Id.* at 278.

[7] *Addington v. Hall*, 160 Kan. 268, 160 P.2d 649 (1945).

[8] See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

an assault stemming from a purely personal matter to be compensable, the injured worker must prove either the injuries sustained were exacerbated by an employment hazard,[9] or the employer had reason to anticipate that injury would result if the coworkers continued to work together.[10]

In *Coleman*,[11] the Kansas Supreme Court stated: "An injury to a nonparticipating employee from workplace horseplay arises out of employment and is compensable under the Kansas Workers Compensation Act."

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[13]

ANALYSIS

Based upon the evidence presented to date, this Board Member finds claimant has failed to prove that he was struck on the head by Ben Thompson as alleged, either in anger or as horseplay. None of the witnesses support claimant's version of events. The greater weight of the credible evidence is that Mr. Thompson simply removed claimant's hat from claimant's head and did not strike claimant. Accordingly, claimant's injury did not result from the incident at work that claimant described. Furthermore, had claimant been struck in the head as he described, there is no basis for characterizing such action as horseplay. It would have been an assault and battery. If the injury resulted from an unprovoked and unforeseeable assault, claimant would have to prove that the assault was somehow related to the employment for it to be compensable. Such a relationship has not been established.

CONCLUSION

Claimant's head injury did not arise out of his employment with respondent and is not compensable.

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[9] *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 349, 900 P.2d 857 (1995).

[10] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, Syl. ¶ 2, 909 P.2d 657 (1995).

[11] *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, Syl., 130 P.3d 111 (2006).

[12] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[13] K.S.A. 2007 Supp. 44-555c(k).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated December 19, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge